UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEONTAY WILDER and DIBELLA ENTERTAINMENT, INC,

Plaintiffs,

– against –

WORLD OF BOXING LLC and ALEXANDER POVETKIN,

Defendants.

Civil Action No. 1:16-cv-04423 (ALC) (GWG)

WORLD OF BOXING LLC, ALEXANDER POVETKIN, and ANDREY RYABINSKIY,

Plaintiffs,

– against –

DEONTAY WILDER, DIBELLA ENTERTAINMENT, INC. and LOU DIBELLA,

Defendants.

Civil Action No. 1:16-cv-04870 (ALC) (GWG)

MEMORANDUM OF LAW IN SUPPORT OF THE WORLD OF BOXING PARTIES' MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, A NEW TRIAL

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March 10, 2017

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World of Boxing LLC, Alexander Povetkin and Andrey Ryabinskiy ("Defendants") request judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 or, in the alternative, that the Court order a new trial pursuant to Rule 59(a), to be preceded by discovery and an evidentiary hearing regarding the testing procedures performed by the UCLA Olympic Analytical Laboratory on Mr. Povetkin's April 7, 8 and 11, 2016 samples.

UNDISPUTED FACTS

A. Background

This case arises from a cancelled boxing match between Deontay Wilder and Alexander Povetkin, sanctioned by one of the four major boxing sanctioning bodies, the World Boxing Council, and scheduled to take place on May 21, 2016. The parties' contract required Mr. Wilder and Mr. Povetkin to participate in pre-Bout anti-doping testing conducted by the Voluntary Anti-Doping Association ("VADA"). VADA's agent collected urine samples from Mr. Povetkin on April 7, 8, 11, 27 and May 17, 2016, and sent the samples to the UCLA Olympic Analytical Laboratory ("UCLA") for testing. Defendants' Trial Exhibits ("Defs. Exs.") K, L, M, N.

B. WADA's April 11 Notice States that Meldonium Can Persist In Urine Samples "For a Few Months."

On April 11, 2016, the World Anti-Doping Agency ("WADA") issued an announcement concerning a drug called Meldonium. Defs. Proposed Ex. B.[1] Meldonium is an over-the-counter medicine available in Eastern Europe. Trial Transcript ("Tr.") 285 (Butch). It protects the heart cells from damage or death during ischemia (inadequate oxygen supply). Tr. 284-85 (Butch). Meldonium had been added to WADA's prohibited list effective January 1, 2016, in an

[1] The Court did not admit the Notice into evidence, even though both parties listed it without objection in the JPTO.

announcement dated September 29, 2015. Tr. 298 (Butch).

WADA issued the April 11 Notice because there had been hundreds of adverse analytical findings for Meldonium at the beginning of 2016. As Plaintiffs' expert testified, "never had any one drug had so many adverse findings around the WADA community." Tr. 464 (Eichner). Although most drugs clear from the body in a week (Tr. 403 (Eichner)), the April 11 Notice explained that in the case of Meldonium, "long term urinary excretion. . . can persist. . . for a few months." Tr. 300 (Butch). The Notice therefore set forth "special rules to make sure you were not accidentally catching someone who might have used [Meldonium] in December of 2015, when it wasn't prohibited." Tr. 466 (Eichner).

C. UCLA's Screening Tests Detect Meldonium In Mr. Povetkin's Early April Samples

On April 13 and 15, 2016, UCLA conducted screening tests on Mr. Povetkin's April 7, 8 and 11 urine samples. Defs. Exs. Y, Z, AA.

UCLA used a testing method called mass spectrometry. Every molecular compound subject to mass spectrometry creates a unique spectrum—or "fingerprint"—of mass to charge ratios. Tr. 210-11 (Butch), 348-49 (Butch). For Meldonium, this "fingerprint" has peaks at:

- 58.07 mass-to-charge ratio (m/z),
- 59.07 m/z, and
- 147.11 m/z.

Defs. Ex. T at p. 976; Tr. 349 (Butch).

When UCLA determined the level at which it could detect Meldonium, it looked only for the "peak" at 59.07 m/z and—using that *one* identifying criterion—concluded that it could detect

Meldonium at 20 nanograms per milliliter, *see* Defs. Ex. V; Tr. 347 (Butch).[2]

Using that standard, UCLA's screening tests for the three early April samples detected Meldonium. Exs. Y, Z, AA. In fact, internal UCLA documents showed that the samples matched the following identification criteria for Meldonium:

1. The presence of an ion at 58.07 m/z—a known marker for Meldonium—was a match. *Id.*

2. The presence of an ion at 59.07 m/z—a second known marker for Meldonium—was a match. *Id.*

3. The "run time" in the mass spectrometer was a match for Meldonium. Defs. Exs. Y, Z, AA.

Based on these identifying criteria, UCLA advanced all three samples to "confirmation testing" for Meldonium. Defs. Exs. Y, Z, AA.

D. UCLA's Confirmation Tests on Mr. Povetkin's Early April Samples Meet Five of the Six Identifying Criteria

UCLA also used mass spectrometry for confirmation testing of the samles. *Id.* UCLA conducted the confirmation tests on April 14 and 18, days after publication of the WADA April Notice. *Id.* Internal UCLA documents from the confirmation testing showed that Mr. Povetkin's samples matched the profile for Meldonium on the following five identification criteria:

1. The presence of an ion at 58.07 m/z—a known marker for Meldonium—was a match. *Id.*

2. The presence of an ion at 59.07 m/z—a second known marker for Meldonium—was a match. *Id.*

3. The "run time" in the mass spectrometer was a match. Pls. Ex. 12 at 1, 4, 7.

4. The presence of an ion at the molecular weight of Meldonium—147.11 m/z—was a match. *Id.*

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[2] Dr. Butch separately claimed that the UCLA laboratory's "limit of detection" for Meldonium was at or below "10 nanograms per milliliter." Tr. 236-37.

5. The ratio of abundance between the ions at 58.07 m/z and 59.07 m/z was a match. *Id.*

However, a sixth identification criterion was not a match: the ratio of abundance between the ions at 58.07 and 147.11 was lower than the amount required to meet WADA's technical standards. *Id*; Tr. 239-42 (Butch). In other words, the relative abundance of the ion at 147.11 m/z compared to the abundance of the ion at 58.07 m/z was lower than the tolerance set forth in the WADA technical standard. *Id.* Someone at UCLA stamped an internal report containing this information with the word "negative". Pls. Ex. 12 at 1, 4, 7.

E. UCLA's Drug Testing Reports on Mr. Povetkin's Early April Samples Omit All Reference to the Meldonium Testing

Dr. Butch testified that: "[i]f the confirmation testing doesn't demonstrate the presence of Meldonium, then the samples are reported out as negative." Tr. 217 (Butch).

On April 15, and 22, UCLA provided drug testing reports concerning the early April samples to VADA. Defs. Exs. K (pp. VADA-436, 432), L (p. VADA-440). But these reports did not indicate that the samples were "negative" for Meldonium. As Dr. Butch admitted, all reference to the testing method for Meldonium testing was "omitted" from these reports. Tr. 396-402 (Butch). The reports did not even disclose that the samples had been tested for Meldonium. Defs. Exs. K, L. Dr. Butch never offered any explanation for why these reports omitted reference to the testing procedure for Meldonium.

VADA's reports to the parties did not state that UCLA failed to report the results of Meldonium testing—they simply stated that the samples were "negative." Defs. Exs. K, L.

F. UCLA's Screening and Drug Testing Report on Mr. Povetkin's April 27 Sample Are Reported as "Adverse"

UCLA screened Mr. Povetkin's April 27 sample on May 10, 2016. Defs. Ex. BB. On May 11, UCLA performed confirmation testing on that sample for Meldonium. *Id.* This time, the sample met all six identification criteria for Meldonium—not merely the five. Pls. Ex. 16 p. 32. Someone in the UCLA lab estimated the concentration of Meldonium at 70 nanograms per milliliter. *Id.* This was 1/14th of the 1,000 nanogram/ML cutoff reflected in WADA's April 11 Notice, and fully consistent with WADA's Notice reporting the persistence of Meldonium in the "low 10's of [nano]grams per milliliter for a few months." *See* Tr. 300 (Butch).

On May 12, 2016, UCLA reported to VADA that Mr. Povetkin's April 27 sample had tested positive for Meldonium. UCLA reported estimated the concentration at 70 nanograms per milliliter. Defs. Ex. M.

On May 13, 2016, VADA reported to the parties that the April 27 sample had been "Adverse. Urine Specimen contains Meldonium." Defs. Ex. M.

G. Plaintiffs Declare Breach and Make Statements to the Press Based on the Supposedly "Negative" Early April Samples

On May 14 and May 15, 2016, Messrs. Wilder and DiBella declared breach.[3] Mr. Wilder's counsel stated: "The test results of these [early April] samples were negative and reflect the absence of Meldonium in Mr. Povetkin's system as of those dates. The only logical conclusion that can be deduced from the evidence…is that Mr. Povetkin must have taken Meldonium after those other tests were conducted." Yalowitz Dec. Ex. A.

Mr. Wilder and Mr. DiBella also began contacting reporters and making statements in the press calling Mr. Povetkin a "cheater" who "stole the fight."[4] The press, too, reported that Mr.

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[3] Yalowitz Decl. Ex. A (Letter from J. Wirt to WBC, dated May 14, 2016); Yalowitz Decl. Ex. B (Wilder Press Release dated May 15, 2016).

[4] William Rhoden, *Even Deontay Wilder, an Untainted Boxer, Loses Out in a Doping Scandal*, NYTimes.com (May 16, 2016), available at https://www.nytimes.com/2016/05/17/sports/even-deontay-wilder-an-untainted-boxer-loses-out-in-a-doping-scandal.html; Wil Esco, *Deontay Wilder frustrated by WBC, claims thousands of boxers are doping*, BadLeftHook.com (May 24, 2016), available at

Footnote continued on next page

Povetkin's April 7, 8 and 11 tests had been "negative for any banned substances."[5]

H. A WADA-Accredited Lab Publishes Research Concluding That Meldonium Remains in Red Blood Cells and Is Excreted in Urine for "Months" After Ingestion

In May 2016, researchers at the WADA-accredited lab in Cologne, Germany, published a scientific paper concerning Meldonium. Defs. Ex. C. The paper has been called the "Tretzel paper" after the lead author. The Tretzel paper relied on testing results detecting Meldonium in urine for much longer than most drugs—between 1,000 and 9,000 nanograms per milliliter for more than a month. Defs. Ex. C; Tr. 322-23 (Butch); *see* Tr. 463 (Eichner) (most drugs are gone in a week). The Tretzel paper further reported test results detecting Meldonium in red blood cells for at least 16 days after administration of a single 500 milligram dose. Defs. Ex. C; Tr. 319-21 (Butch). The authors concluded from these test results that the human body incorporates Meldonium into red blood cells, or "erythrocytes," and then slowly releases the Meldonium back into the blood stream. Defs. Ex. C; Tr. 321 (Butch). The authors then concluded that "detection windows after long-term administration of high but yet therapeutic amounts of Meldonium span

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http://www.badlefthook.com/2016/5/24/11759548/deontay-wilderfrustrated-by-wbc-claims-thousands-of-boxers-are-doping; *Wilder: This is Not Povetkin's First Time, Man Up and Admit Use!*, BoxingScene.com (May 17, 2016), available at http://www.boxingscene.com/wilder-this-not-povetkins-first-time-man-up-admituse--104679; Dan Rafael, *Wilder: Povetkin "should be suspended,"* ESPN.com (May 25, 2016), available at http://www.espn.com/blog/dan-rafael/post/_/id/16072/wilder-povetkin-should-be-suspended; Drew Champlin, *After being on "verge of depression," Deontay Wilder ready for next heavyweight title fight in Birmingham*, AL.com (June 15, 2016), available at http://www.al.com/sports/index.ssf/2016/06/after_being_on_verge_of_depres.html.

[5] Dan Rafael, *Two Reports Assert Alexander Povetkin Took Meldonium After Ban*, ESPN.com (May 15, 2016), available at http://espn.go.com/boxing/story/_/id/15543234/alexander-povetkin-tookmeldonium-was-banned-according-two-separate-reports) (reporting that "ESPN.com has obtained two separate written reports sent by VADA's president, Dr. Margaret Goodman, to both camps as well as the WBC, whose title Wilder holds, notifying them that Povetkin was negative for any banned substances in VADA-conducted tests on April 7, April 8 and April 11").

over several weeks *and might even extend to months*." Defs. Ex. C at 501-02 (emphasis added); Tr. 324 (Butch).

As Plaintiffs' expert confirmed, the three-month life span of red blood cells "isn't an outside limit at all" on how long Meldonium can stay in the body. Tr. 467-68 (Eichner).

I. After Receiving Additional Study Results, WADA Requires All Accredited Labs To Report Meldonium Levels Below 1,000 Nanograms per Milliliter as "Not Adverse" Until September 2016

On June 30, 2016, WADA issued a second Notice concerning Meldonium. Defs. Proposed Ex. D. The June Notice stated that WADA had just received "the results from some of the urinary excretion studies that we had commissioned." Tr. 334-35 (Butch). This new scientific information enabled WADA "to provide the following updated guidance" regarding Meldonium. *Id.* For urinary concentrations below 1 microgram per milliliter for any sample collected before September 30, 2016—"use of Meldonium could have occurred before the prohibited list was published by WADA on 29 September 2015." Tr. 335 (Butch).

On July 19, 2016, WADA wrote to all its Laboratory Directors instructing them that until September 30, 2016, urinary concentrations of Meldonium below or equal to 1 microgram per milliliter "***not*** be reported as Adverse Analytical Findings." Defs. Ex. E (emphasis added). The Letter explained that this was because "urinary concentrations equal or below 1 µg/mL [microgram per milliliter] detected up to 30 September 2016, may be compatible with an intake of meldonium before the relevant date." *Id.* Dr. Butch admitted:

> Q. That was new information as of June 30th, right?
>
> A. Yes.
>
> Q. And after you received that, UCLA changed its practice with respect to the reporting of Meldonium results, right?
>
> A. Yes.

Q. After June of 2016, UCLA started reporting urinary of
Meldonium below 1,000 nanograms as not being adverse
analytical findings, right?

A. I don't believe we had any cases at that point, but if we would
have, yes.

Q. If you had had any cases below a thousand nanograms per
milliliter, those would have been reported as not adverse?

A. Yes. (Tr. 333-34 (Butch).)

PROCEDURAL HISTORY

A. The Pleadings

Mr. Wilder and DiBella Entertainment (collectively with Mr. DiBella, "Plaintiffs") commenced this action in June 2016 alleging breach of contract.

The central factual dispute set forth in the pleadings is whether Mr. Povetkin took Meldonium after April 11, based on the allegedly "negative" tests from his April 7, 8 and 11 samples. Plaintiffs' claims, as pled, are predicated on the theory that Mr. Povetkin ingested Meldonium between April 11 and April 27, and that the pattern of three negative samples collected on April 7, 8, and 11 followed by the positive sample proves this alleged improper use. *See* DE-1, Plaintiffs' Complaint ¶ 50 ("On information and belief that is based upon the fact that Povetkin's three negative tests (administered on April 7, 8, and 11, 2016), all of which preceded the positive test administered on April 27, 2016, Povetkin took the Meldonium after his April 11, 2016 test, gambling that he would not be randomly tested again after his third test back on April 11, 2016.").

Defendants, in turn, filed claims for breach of contract and defamation. Wilder and DiBella Entertainment and Mr. DiBella asserted, in their reply to World of Boxing's counterclaims, that Mr. Povetkin ingested Meldonium between April 11 and April 27. DE-24, ¶¶ 54-55 ("Plaintiffs admit only that Povetkin's April 27, 2016 test was positive for Meldonium, and further allege that the positive test result was due to the fact that Povetkin took Meldonium on or after April 11, 2016 and prior to his being tested on April 27, 2016, and otherwise deny the allegations from Paragraph 54." "Plaintiffs admit only that the positive results were disclosed on or about May 13, 2016, and that Povetkin's "B" sample was also positive, precisely because Povetkin ingested Meldonium after his April 11, 2016 test and before his April 27, 2016 test.").

B. The September 26 Conference

The parties first appeared for a conference before the Court on September 26, 2016. At that conference, the Court set a February 6 trial date on two premises: (1) that there would be no motion practice; and (2) that discovery would be complete by December 15, 2016. Indeed, Plaintiffs repeatedly asked the Court to fast-track the case in lieu of motion practice: "First of all, when I was suggesting that we do this fast track, the idea is we were getting rid of ***all*** these motions because I think, for example, the defamation motion is subject to dismissal. What I was thinking is that my view was we were going to move towards trial. We weren't going to waste time with motions." DE-42 at 27 (emphasis added); *Id*. at 28 ("the whole concept of this was ***not to make motions***.") (emphasis added); *Id*. at 31 ("***what I don't want to do is waste time between now and December 15 responding to motions***.") (emphasis added). The Court accepted the proposal: "The February 6 trial date was set based on what counsel were indicating in terms of their willingness to sort of forego motion practice to tee this thing up." *Id*. at 28.

With respect to discovery, Plaintiffs' counsel stated that he would cooperate in discovery, and that, "I think we can have discovery done by the end of December and be ready to move forward with trial." DE-42 at 12. Defendants requested that the parties have the standard 30-day period to prepare a joint pre-trial order. *Id.* at 13-14. Following the Conference, the court entered a minute order setting the Discovery Deadline as December 15, 2016; ordering Motions in Limine and a Proposed Joint Pretrial Order due by January 13, 2017; setting a Final Pretrial Conference for January 27, 2017, and scheduling jury selection and trial for February 6, 2017.

C. The Interim Deadlines

Following the initial conference, the Magistrate Judge entered an order setting interim deadlines. DE-23. Document production was to be substantially completed on November 7, 2016. Expert reports were to be exchanged on December 2. Fact depositions were to be completed by December 9, and expert depositions were to be completed by December 16.

D. The Wilder Parties' Failure to Comply with Two Conditions for a February 6 Trial

Plaintiffs failed to comply with the two conditions for a February 6 trial. *First*, with regard to motion practice, Plaintiffs filed a motion to disqualify trial counsel on November 7, 2016. DE-30-32. The motion to disqualify was supported almost exclusively by the Declaration of an individual named John Wirt. Plaintiffs subsequently "withdrew" the motion, but took the position that Defendants' trial counsel would be violating professional responsibilities if they did not withdraw. Defendants then devoted significant time and resources to the preparation and filing of a motion in limine to exclude the testimony of Mr. Wirt, which the Magistrate Judge granted in a written order dated December 16, 2016. DE-84.

Second, notwithstanding the Wilder parties' rosy prediction, the discovery process was highly contentious, with both sides seeking relief on multiple occasions from the court. DE-25, 29, 33, 34, 44, 57, 67, 73, 74, 78, 81, 82, 89, 91, 100, 106. During discovery, not a single one of the Court's discovery deadlines were met:

- Plaintiffs missed the November 7 deadline for document production and continued to produce core documents until January 31, 2017, five days before the start of trial.

- Plaintiffs missed the December 9 deadline for fact depositions and did not complete fact depositions until February 3, 2017—three days before trial.
- Plaintiffs missed the December 2 deadline for expert reports and then served supplemental expert reports on December 21, 2016, January 23, January 30, and February 3, 2017—three days before trial.
- Plaintiffs missed the December 16 deadline for expert depositions and did not complete expert depositions until February 2, 2017—four days before trial.

E. Defendants' Application for a Reasonable Continuance

On November 14, 2016—twelve weeks before trial—Defendants filed an application to re-set the discovery cutoff to January 31, 2017 and to schedule a trial consistent with the Court's calendar thereafter. DE-37. The District Judge referred that application to the Magistrate Judge (DE-47), who allowed the discovery deadlines to slip. On December 23, the Magistrate Judge denied the request to continue the trial and *sua sponte* limited the issue to be tried to "the issue of whether Povetkin ingested Meldonium on or after January 1, 2016." DE-94. Defendants objected to the Magistrate Judge's ruling on January 5, 2017, at which point the parties were already three weeks beyond the Court's original discovery deadline. DE-111. The Court overruled the objection on January 17, 2017—less than three weeks before trial. DE-129.

F. Dr. Butch's Flouting of Subpoenas and Court Orders

As noted above, Plaintiffs' Complaint and their Answer to Counterclaim—and their entire affirmative case at trial—rested on the contention that Mr. Povetkin tested "negative" for Meldonium in the April 7, 8, and 11 samples as reported by UCLA.

Documents and testimony concerning the UCLA laboratory's testing and results are therefore central to Court's truth-seeking function in this case.

Defendants subpoenaed Dr. Butch and UCLA on November 3, 2016 for both Dr. Butch's deposition and for the production of documents "referencing or concerning Meldonium" and documents and communications "referencing or concerning Alexander Povetkin." Yalowitz Dec. Ex. C.

Although Dr. Butch was subpoenaed to appear as a fact witness on November 22, 2016, his counsel refused to produce him, insisting that the deposition be put off until his expert report was completed. Yalowitz Dec. Ex. D.

On December 2 and 5, UCLA produced documents in response to the subpoena. UCLA's document production did not include *any* information about the April 7, 8, 11 or May 17 samples. Through the course of that week, UCLA continued to insist that it had completed its production and had no further responsive documents. On December 9, Defendants' counsel wrote to Dr. Butch's and UCLA's counsel to remind her of their continuing obligations: "If any additional responsive documents come to your attention, please let us know." Yalowitz Dec. Ex. E.

Yet at the very same time that Dr. Butch and UCLA were claiming that they had no further responsive documents, Plaintiffs were frantically asserting that Dr. Butch immediately needed certain information "to identify the urine samples which yielded the negative results." Yalowitz Dec. Ex. F. On December 6, 2016, Plaintiffs revealed for the first time that "Dr. Butch…needs the sample numbers" of Mr. Povetkin's April 7, 8, 11 and May 17 samples, "because the names corresponding to the sample numbers are kept confidential." Letter from P. Schalk to Hon. G. Gorenstein (Dec. 6, 2016) (DE-74) at 1 n.1.

Defendants' principal response to Plaintiff's request was to seek an "understanding how it would work in terms of providing both sides' experts with equal access to information and with an equal opportunity to use the information." Yalowitz Dec. Ex. F. Rather than respond to this request, Plaintiffs said only that "Dr. Butch's *findings* will be made available." Letter from P. Schalk to Hon. G. Gorenstein (Dec. 6, 2016) (DE-74) at 3 (emphasis added).

On December 14, Plaintiffs "consented" to the request that "the WOB Parties' experts to have access to whatever data is obtained." Letter from P. Schalk to Hon. G. Gorenstein (DE-82) at 3. The next day, the Magistrate Judge granted the request, based on Plaintiffs' express representation to the Court that they were consenting to the condition that "the WOB Parties' experts could have access to ***whatever*** data is obtained through identifying the negative sample information." *Id*. at 3 (emphasis added). *See also* Dec. 15, 2016 Tr., DE-104 at 85 (agreeing that the World of Boxing parties would have "equal access to the information"). This was also the subject of the following discussion in open court:

> THE COURT: They want the raw data.
>
> MR. SCHALK: They can have the data the day—as soon as we get it, they can have it.
>
> THE COURT. Okay.

Id. at 93. Accordingly, on December 16, 2016, the Magistrate Judge ordered VADA to produce the sample numbers to Plaintiffs and ordered that Plaintiffs "shall cause the data procured by Anthony Butch, PhD. as a result of receiving the above-described specimen numbers to be sent to counsel for the WOB Parties on the same day that Dr. Butch obtains the same." DE-85 at 2.

Shockingly, neither Dr. Butch nor Plaintiffs produced the actual UCLA drug testing reports, printouts concerning testing for Meldonium, or raw data files underlying the UCLA reports—even though these were plainly responsive to the outstanding subpoena, plainly within the grasp of Dr. Butch, and plainly required by the Court's December 15 Order.

On December 29, 2016, Defendants issued a *second* subpoena to Dr. Butch, requesting production of "[a]ll documents considered in connection with your expert report, dated December 9, 2016, and supplemental expert report, dated December 21, 2016." Yalowitz Dec. Ex. G. It was unimaginable to Defendants that Dr. Butch would issue expert reports that simply never considered (a) the relevant UCLA drug testing reports, or (b) the UCLA files concerning testing of Mr. Povetkin's urine for Meldonium, or (c) the underlying raw data concerning that testing. But it turns out that is apparently what happened and—once again—Dr. Butch and UCLA failed to produce the key documents in the case despite Defendants' extensive efforts to obtain the documents.

G. Dr. Butch Finally Admits He Has Unproduced Documents and Makes a Delayed, Selective Production

When Dr. Butch was finally deposed on January 17, 2017—less than three weeks before trial—he admitted that he had not checked for a "false negative" result in the testing of the April 7, 8, and 11 samples. Butch Dep. 173-75 (Yalowitz Dec. Ex. H).

Thus, three weeks before trial, the central witness in the case admitted that he was blind to the central facts of the case, even though he had already issued two expert reports and responded to two subpoenas and a court order for the production of documents.

Defendants *again* requested production of the documents and raw data from those tests. *Id.* at 173-75, 284-86. Defendants then had to hound Dr. Butch to produce the relevant documents. DE-142 at 2; see also Yalowitz Dec. Ex. I. In December, Plaintiffs' counsel had claimed that it would take only "an hour" to gather the relevant documents. Dec. 15, 2016 Tr., DE-104, at 58-59, 85, 86. But now—with trial rapidly approaching—Dr. Butch and the Plaintiffs dragged their feet. Defendants demanded the documents by email on January 17, on January 19, and again on January 23, and by telephone and in person as well. Letter from Kent

A. Yalowitz to Hon. Gabriel W. Gorenstein dated Feb. 1, 2017 (DE-187); Yalowitz Dec. Ex. I.

Dr. Butch finally made a production on January 23—less than two weeks before trial. Even then, he failed to produce the UCLA drug testing reports themselves and he *still* failed to produce the underlying raw data files.[6]

H. Dr. Butch's Last-Minute Pre-Trial Ambush

The new documents produced two weeks before trial (Pls. Ex. 12) obviously caused everyone to question whether the April 7, 8 and 11 samples were truly "negative." All three screening tests contained multiple tell-tale indicators for Meldonium—the correct retention times and "peaks" in the mass spectrometry "windows" of 58.07 and 59.07 m/z. *Id*. All three samples were sent by someone at UCLA for "confirmation testing" for Meldonium. *Id*. All three samples met five of the six identification criteria for Meldonium on confirmation testing. *Id*. Obviously, someone at UCLA was uncertain enough about the results that they did not "report out" *any* results—positive or negative—for Meldonium for any of those three tests. Defs. Exs. K, L.

In response to these extremely late-produced documents, Defendants quickly retained Dr. de Boer, an expert on mass spectrometry, who provided a report based on the limited data and extremely limited time available. This report observed that "data supplied by the UCLA laboratory strongly indicate that the presence of MELDONIUM during the screening procedure was observed and detected." Yalowitz Dec. Ex. J at 5. In words that are highly applicable to this trial, Dr. de Boer observed:

> Although the reports of being "negative" were initially in favour of

[6] Defendants ultimately received the drug testing reports not from UCLA but from VADA—in response to a subpoena to that entity. Defs. Exs. K, L, M.

> the athlete, they appear now to be used in a manner that is unfair to the athlete. If the conclusions had been "not adverse," it would have been obvious that the samples were at least suspected for the presence of MELDONIUM. It would have revealed that that MELDONIUM was detected, but not identified with appropriate confidence, and thus "not adverse." *Id.* at 6-7.

In response to the complaint that he was treating Mr. Povetkin unfairly, Dr. Butch began to search for facts to support his conclusion. On January 31, 2017—a mere six days before trial—Dr. Butch produced *another* selective tranche of documents, which he had someone generate in an effort to prop up his theory of post-April 11 ingestion.

On February 3, Dr. Butch issued an *additional* expert report purportedly explaining the two new rounds of documents. *See* Tr. 426-27. Defendants had no opportunity to depose Dr. Butch on these reports before trial and indeed, the February 3 report was not available to Defendants until *after the final pretrial conference.*

Dr. Butch's new, last-minute theory—raised for the very first time on the very last business day before jury selection—was that a mystery substance was in Mr. Povetkin's urine—an unidentified molecule with a molecular weight and mass spectrometry fingerprint almost exactly like that of Meldonium, but somehow not Meldonium.

Defendants objected to Dr. Butch's testimony in three important respects—first, that he not be permitted to file a *fourth* expert report on the last business day before trial; *second*, that he was not qualified to interpret mass spectrometry data; and *third* that he was leveraging his expert role to transmit hearsay to the jury improperly, in violation of Second Circuit precedent. Letters from Kent A. Yalowitz to Hon. Gabriel W. Gorenstein and Andrew L. Carter, Jr. dated February 1, 2 and 4, 2017. (DE-187, DE-197, DE-204.)

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW UNDER RULE 50

The Court should grant a Rule 50 motion if "the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [people] could have reached." *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970); *see Cruz v. Local Union No. 3*, 34 F.3d 1148, 1155 (2d Cir. 1994); *Sir Speedy, Inc. v. L&P Graphics, Inc.*, 957 F.2d 1033, 1038-39 (2d Cir. 1992).

While the court draws reasonable inferences in favor of the non-moving party, the court "may take into account evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that any of that evidence comes from disinterested witnesses." 9B Arthur R. Miller, *Wright & Miller's Fed. Prac. & Proc. Civ.* § 2529 (3d ed. 2017); *see, e.g., Figueroa v. Mazza*, 825 F.3d 89, 98 n.8 (2d Cir. 2016) (affirming grant of Rule 50(b) motion).

Here, no reasonable jury could have concluded that Plaintiffs had carried their burden of proving either (a) that the early-April tests were negative, or (b) that Mr. Povetkin took Meldonium after January 1 but before April 11.

A. Plaintiffs Failed to Prove that the April 7, 8, and 11 Tests Were Negative

1. The Evidence At Trial On the Early-April Tests

a. Plaintiffs' Case In Chief

Plaintiffs' sole evidence in their case in chief was testimony from Dr. Butch and Dr. Eichner. Both witnesses testified that Mr. Povetkin's positive April 27 sample resulted from ingestion of Meldonium after April 11th. Their hypothesis hinged on the assumed negative results of Mr. Povetkin's April 7, 8, and 11 samples. *See, e.g.*, Tr. 232 (Butch: "The 4/7, 4/8 and 4/11 sample are negative and then 16 days later on the 4/27, the sample is positive for Meldonium at 70 nanograms per milliliter. This indicates that Meldonium was used."), 451

(Eichner: "[W]hen I see three negatives followed by a positive like that, I see no other way, other than Meldonium was administered sometime after the April 11th collection.").

Dr. Butch and Dr. Eichner both admitted that until cross-examination, they had never seen the UCLA drug testing reports for the early April samples. Tr. 295-96, 354, 400 (Butch); Tr. 471-72 (Eichner). Dr. Eichner offered no testimony about the early April tests.

Dr. Butch admitted that the mass spectrometry screening data for all three samples contained "peaks" in the two windows used to detect the presence of Meldonium, and that each sample was advanced to confirmation testing. Defs. Exs. Y, Z, AA; Tr. 238 (Butch).

Documentary evidence from the confirmation testing showed peaks in the three windows corresponding to the three ions that comprise Meldonium's molecular fingerprint. See Defs. Exs. Y, Z, AA. Documentary evidence also showed that the compound met five of six identifying criteria for Meldonium. *See supra* p. 3-4; Pls. Ex. 12, pp. 1, 4, 7.

Dr. Butch's entire basis for concluding that the substance detected in Mr. Povetkin's tests was not Meldonium was that sixth identification criterion—the ratio of abundance between the amount of ions in the "window" at 58.07 and the "window" at 147.11. Dr. Butch called this the "third transition." Dr. Butch explained that someone in his lab "created new data" in the week before trial to explain the suppression of the abundance of this ion transition. Tr. 260 (Butch) ("this is the new data you created").

On cross-examination, Dr. Butch acknowledged that under WADA technical standards, it is permissible to "exclude one of the transitions if you have a valid explanation." Tr. 416 (Butch). Dr. Butch admitted that "a partially co-eluting substance" was one such "valid explanation" according to WADA's technical standards. Defs. Ex. LL; Tr. 418 (Butch). Dr. Butch called this phenomenon "overlapping peaks." Tr. 417 (Butch).

Dr. Butch admitted that there were procedures to "separate the peaks" when they overlap; he also admitted that no one at UCLA performed any such procedures on the April 7, 8, and 11 samples. Tr. 418-19 (Butch). On redirect, he stated that there were no overlapping peaks in the confirmation tests for the 147.11 ion. Tr. 444 (Butch: "it was just a single peak"). Dr. Butch did not refer to any documents in asserting that there was "just a single peak."

b. Defendants' Case

Defendants' expert, Dr. Douwe de Boer, showed the jury the "overlapping peaks" on the newly created UCLA documents—Plaintiffs' Exhibit 33. *See* Yalowitz Dec. Ex. K (Pls. Ex. 33, marked to show Dr. de Boer's explanation). He explained that a second molecule of very close molecular weight to Meldonium interfered with the mass spectrometer's detection of the ion at 147.11. Dr. de Boer showed how the peaks on the third and fourth windows "overlapped" on Exhibit 33, with the typical ski-slope-shaped tail of the 147.11 peak truncated into a cliff-shaped tail instead. *See* Yalowitz Dec. Ex. K; Tr. 577-78 (de Boer) ("the third ion is a little bit ahead of the line, and then the fourth is a little bit after the line"), 579 (the 147.11 "suddenly stops at the peak of that little heavier molecule"), 581 (de Boer) ("the 147.1119 in the third panel is getting crowded out by that heavier molecule that we're seeing in the fourth panel"), 582 (de Boer) ("this is indeed an interfering peak").

Dr. de Boer explained that an "interfering peak" is a valid reason to disregard the lower abundance of the 147.11 ion in the test results of the April 7, 8, and 11 samples. Tr. 584-85; *see* Ex. LL n.4. (Dr. Butch agreed that "you can exclude one of the transitions if you have a valid explanation" and "clear evidence that one of the established ions is being interfered" is a "valid explanation." Tr. 416 (Butch).) Thus, there is no dispute that an interfering ion is a valid reason for using the two identifying ions—58.07 and 59.07—and not three. *Id.*

On cross-examination, Plaintiffs' counsel principally attacked Dr. de Boer for being hired by athletes. Tr. 600-07 (de Boer). In contrast, with regard to the "interfering ion," Plaintiffs' counsel actually elicited testimony *confirming* that there was an interfering compound:

> Q. Your conclusion is the heavier weight in this bottom box [fourth panel in Pls. Ex. 33] is explained by the fact that there's an interfering compound, correct?
>
> A. The heavier weight shows that the interfering peak is a different compound, yeah. * * *
>
> Q. Okay. But there's nothing here in this WADA document that says a laboratory *has* to ignore, is obligated to ignore, the third ion in the case of a co-eluting substance, right?
>
> A. It is not stating that exactly, but as a scientist, you must see all the positive evidence if you want to have a true, truthful expert opinion."

Tr. 629-31 (de Boer) (emphasis added); *see* Tr. 632 (de Boer: "[t]he interfering peak is not Meldonium").

c. Plaintiffs' Rebuttal Case

On rebuttal, Dr. Butch testified that a molecule interfering with the detection of Meldonium would "typically" suppress detection of *all three* identifying ions, not just the third ion. *See, e.g.*, Tr. 722 (Butch: "that typically doesn't happen in the collision cell" and "it's going to affect all of the ions that you're interested in in the same manner"). Dr. de Boer had already explained ion suppression most commonly occurs in the ionization chamber, but that this is not the only form of ion suppression. Tr. 657-58. Non-classical ion suppression, he explained, occurs after ionization and, as in this case, may suppress only part of the molecule of interest. *Id.* When questioned about non-classical ion suppression, Dr. Butch stated only that he had never heard of it. Tr. 726 (Butch: "I've not heard it called that" and "I'm not familiar really with ion suppression occurring in the collision cell").

Dr. Butch also told the jury that he was "suspecting" co-elution in the 58.07 and 59.07

"windows," but admitted that he did not actually check the raw data to confirm his "suspicion." Tr. 728 (Butch). He also admitted that he was not aware of any other molecule that has a molecular weight of 147.1 and peaks at 58 and 59. Tr. 729 (Butch).

2. Plaintiffs' Evidence Did Not Prove that the Early April Tests Were Negative

Where, as here, the nonmovant has relied principally on expert testimony, but the expert testimony failed to present proof sufficient to meet its burden under a preponderance of the evidence, the court will award judgment as a matter of law. *Drake v. Delta Air Lines, Inc.*, Case No. 94-CV-5944, 2005 WL 1743816, *1, 6 (E.D.N.Y. July 21, 2005), *aff'd*, 216 F. App'x 95 (2d Cir. 2007). In *Drake*, for example, the plaintiff's only evidence was statistical expert testimony. *Id*. at *5. The court found that the expert's testimony was questionable because he relied on assumptions that turned out to be wrong. *Id*. Accordingly, the court held that the expert testimony was not sufficient for plaintiff to meet his evidentiary burden and granted a judgment as a matter of law for defendants. *Id*. at *5, 9.

So too here, where Plaintiffs rested their entire case on the expert testimony of Dr. Butch to establish that the April 7, 8, and 11 tests were negative.

First, Dr. Butch never considered the most important documentary evidence: the UCLA drug testing reports for the first three April samples, which omitted the result of the test method that detects Meldonium. Defs. Exs. K, L (omitting test method 1002); Tr. 396-400, 402 (testimony by Dr. Butch that the 1002 test method was "omitted from the description of the testing that was performed"). Dr. Butch never even attempted to explain the omission. Instead, he assumed (incorrectly) on direct examination that the samples had been "reported on as negative." Tr. 217.

Second, Dr. Butch admitted that a UCLA screening test generally "indicates the presence" of the compound of interest. Tr. 259 (Butch). He also proclaimed that the UCLA laboratory's "limit of detection" for Meldonium in screening tests was at or below "10 nanograms per milliliter." Tr. 236-37 (Butch). The documents UCLA produced showed that the limit of detection was 20 nanograms per milliliter and that the *only* criteria the UCLA lab used to determine this "limit of detection" was a "peak" at 59.07. Defs. Ex. V; Tr. 347 (Butch: "Q. And so when you said we can detect Meldonium down to 20 nanograms per milliliter, which one were you relying on, 58.07 or 59.07? A. This is 59.").

Here, the screening data for Povetkin's samples showed this very same "peak" not only at the critical 59.07, but also at 58.07. Thus, according to UCLA's own "limit of detection" documents, Meldonium *was* in fact "present" and "detected" in the April 7, 8, and 11 samples on the screening tests. *See* Tr. 410 (Butch: April 7 sample was "screen positive for Meldonium, yes").

Third, there was no dispute that all three samples were "advanced" for "confirmation testing" for Meldonium. Defs. Exs. Y, Z, AA; Tr. 238, 408-11, 413-14 (Butch). And, as described above, there was no dispute that on "confirmation testing" the compound matched five of the six identification criteria for Meldonium. *See supra* at 3-4.

Finally, Dr. Butch's creative, last-minute theory to explain away the match could not be reconciled with the actual document his lab created. Dr. Butch admitted that WADA permitted the abundance of one ion to be disregarded where there was a "partially co-eluting" substance reflected in "overlapping peaks." Tr. 416 (Butch). Plaintiffs' Exhibit 33 showed unequivocally that for the April 7, 8, and 11 samples, the peak at 147.11 (in the third panel) was truncated because of an interfering ion (shown in the fourth panel), which both experts agreed weighted

147.1212. Yalowitz Dec. Ex. K (also showing April 27 sample, with no interfering ion).

At bottom, Dr. Butch's denial that the molecule detected in the April 7th, 8th, and 11th samples was Meldonium—without any explanation as to what the molecule's identity could be other than Melonium—was based entirely on speculation rather than science: "I'm suspecting there's co-elution in those windows [58.07 and 59.07] as well." Tr. 728 (Butch); *id.* (admitting "You didn't actually check the raw data at 58 or 59.").

In short, Plaintiffs' case suffered from the same fatal flaw observed in *Drake*: it relied on expert testimony grounded in an assumption (the negative status of the April 7th, 8th, and 11th samples) and speculation.

Similarly, in *Levitant v. City of New York Human Resources Administration*, the court entered judgment as a matter of law for defendants pursuant to Rule 50 where the defendants' evidence outweighed the evidence presented by the plaintiffs in their case-in-chief. 914 F. Supp. 2d 281, 287, 291, 295-96 (E.D.N.Y. 2012), *aff'd*, 558 F. App'x 26 (2d Cir. 2014). In that case, the plaintiff relied merely upon his own vague testimony to make his case of employment discrimination and retaliation, offering no other evidence to prove his claims. *Id*. at 287, 299, 302. Defendants, on the other hand, offered several fact witness which discounted plaintiff's testimony, as well as contemporaneous memoranda and other written documentation. *Id*. at 291-295. The court also found that since the weight of evidence was overwhelmingly in favor of defendant, that if the appellate court overturned its Rule 50 determination, it [would] grant a new trial pursuant to Rule 59. *Id*. at 308.

B. Plaintiffs Failed to Prove that Mr. Povetkin Took Meldonium After January 1 and Before April 11

Plaintiffs' exclusive theory in their case in chief was that Mr. Povetkin took Meldonium *after* April 11. *See* Tr. 232, 235-238, 246, 249, 326 (Dr. Butch repeatedly stated his expert opinion: that Mr. Povetkin took Meldonium after April 11); Tr. 450-53, 452; 475 (Dr. Eichner states his expert opinion that Mr. Povetkin took Meldonium after April 11).

At the close of Plaintiffs' case, Defendants moved for judgement under Rule 50(a) and the Court reserved decision. Tr. 480. To the extent that Plaintiffs had a theory that Mr. Povetkin took Meldonium *before* April 11 but *after* January 1, they did not carry their burden on that theory, and the motion should have been granted. Having reserved decision on the Rule 50 motion, the Court must now also consider evidence submitted in the defense case. *See Williams v. Long Island R.R. Co.*, 196, F.3d 402, 408 (2d Cir. 1999)

Defendants offered unrebutted documentary and testimonial evidence that Mr. Povetkin took a two-week course of 1,000 milligrams per day of Meldonium on the recommendation of his doctor from August 31 to September 13, 2015—at a time when the administration of Meldonium to athletes was allowed by WADA, and consistent with the standard of medical care. Mr. Povetkin took the course while training in the mountains of Kazakhstan. Tr. 530-31 (Povetkin). In keeping with his usual practice, he followed the instructions of his doctor, Dr. Maxim Krasavin, with regard to the vitamins and supplements to be used during training. Tr. 529-31 (Povetkin). Dr. Krasavin recommended that Mr. Povetkin take the course of Meldonium in order to protect his heart during the training in Kazakhstan. Tr. 491-94 (Krasavin); *see also* Defs. Ex. O.

Dr. Krasavin testified that he has not instructed Mr. Povetkin to use Meldonium since September 2015. Tr. 494 (Krasavin). Mr. Povetkin testified that he always follows Dr. Krasavin's instructions and that no one other than Dr. Krasavin recommends medications to him. Tr. 530 (Povetkin). Mr. Povetkin testified that he has not ingested Meldonium since September

2015. Tr. 531 (Povetkin).

During cross-examination of Dr. de Boer, Plaintiffs attempted to develop a theory that Mr. Povetkin might have micro-dosed with a single 500-miligram capsule of Meldonium. Tr. 620-22 (de Boer) (posing a series of hypothetical questions "if Mr. Povetkin had taken 500 milligrams of Meldonium"). Based on this hypothetical—for which there was no predicate evidence—Dr. de Boer agreed that the extremely low concentrations of Meldonium in April 2016 were "consistent with Mr. Povetkin having taken [500 milligrams of] Meldonium in March or April 2016." Tr. 623 (de Boer). The hypothetical was insufficient to support a verdict because there was no evidence that Mr. Povetkin took a micro-dose in March or April. The hypothetical was also insufficient to support a verdict because Dr. de Boer disclaimed expertise on pharmacokinetics. Tr. 624 (de Boer). Obviously, answers by a non-expert to a hypothetical question for which the facts are not proven is not sufficient to sustain a verdict. *See Collins v. Penn Cen. Transp. Co.*, 497 F.2d 1296, 1298 (2d Cir. 1974) ("Counsel may ask a hypothetical question so long as he states specifically the factual assumptions of the question. Of course, if the party does not independently prove the facts assumed, the jury is free to disregard the conclusion of the witness") (internal citation omitted). This is all the more so, here, where the concentrations of Meldonium in Mr. Povetkin's urine were all well below 1,000 nanograms per milliliter (Defs. Ex. GG), and the June WADA Notice and July WADA letter to laboratory directors made it crystal clear that such levels simply do not support a conclusion of post-January 1, 2016 ingestion. Defs. Ex. E; Tr. 333-35 (Butch).

Dr. Jessica Goren, the only witness qualified as an expert in pharmacokinetics, testified affirmatively that "[t]here's a lot of pharmacokinetic data that would support" a seven and a half month excretion period. Tr. 683. Dr. Goren explained that some drugs accumulate in a particular type of tissue and are excreted over a long period of time after being released and, in some cases, recaptured and rereleased by that tissue. Tr. 678, 680-83. Based on the Tretzel study, as well as data reported by a study known as the "Liepinsh study" and her expertise in pharmacokinetics, Dr. Goren concluded that positive result of Mr. Povetkin's April 27th sample was consistent with ingestion of a two week course of Meldonium in September 2015. *See* Tr. 678-82 (Goren).

When Plaintiffs tried out their "microdose" theory on Dr. Goren, she rejected it as nonsensical:

> So this isn't an aspirin, where like you take a dose and your headache goes away. This is a medication where you have to take multiple doses over an extended period of time to get an effect. So it's irrelevant, one dose. You would need someone to take multiple doses in order to have any sort of effect.

Tr. 688 (Goren). In short, there was zero evidence to support a verdict on the theory that Mr. Povetkin took Meldonium after January 1 but before April 11, 2016.

II. IN THE ALTERNATIVE, THE COURT SHOULD GRANT DEFENDANTS A NEW TRIAL

Rules 50 and 59 permit the trial court to grant a new trial following a jury verdict. *See* Fed. R. Civ. P. 50(b), 59(a)(1)(A). The Court should exercise its discretion to grant a new trial where "'the jury has reached a seriously erroneous result or . . . the verdict is a miscarriage of justice.'" *Song v. Ives Labs., Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1992) (omission in original).

Here, a new trial is warranted because: (A) the jury's verdict is against the weight of the evidence, (B) the testimony of Dr. Butch, Plaintiffs' key witness, is undermined by his lack of experience, improper reliance on hearsay and speculation; (C) the improperly compressed trial schedule combined with last-minute document production and expert disclosures rendered the trial grossly unfair to Defendants and left unanswered questions about facts that were central to the case; and (D) Plaintiffs' counsel engaged in repeated misconduct on summation.

A. The Verdict is Against The Weight of The Evidence

The Court may grant a new trial when the jury's verdict is against the weight of the evidence. *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 134 (2d Cir. 1998). The Court need not view the evidence in the light most favorable to the non-movant, and may grant a new trial "even if there is substantial evidence supporting the jury's verdict." *Id.* Even if the Court finds that Plaintiffs presented a case sufficient to avoid judgment as a matter of law, a new trial is still warranted because the weight of the evidence falls heavily in favor of Defendants. As such, the jury's verdict for Plaintiffs constitutes a seriously erroneous result and a miscarriage of justice.

Plaintiffs' theory of the case is that Mr. Povetkin "micro-dosed" by ingesting a small amount of Meldonium sometime between April 11 and April 27, 2016, as Plaintiffs' counsel made clear in his opening statement:

> How does somebody test negative on April 7, 8th, and 11th and then test positive for the substance on April 26th [*sic*]? The simplest answer is usually the correct one, and the simplest answer here is that [Mr. Povetkin] tested positive on April 27 because sometime after April 11 he took Meldonium. *That's the only explanation that will make sense in this case.*
>
> * * *
>
> There's just no way Mr. Povetkin can escape the fact that those three tests are not [*sic*] damning evidence that he did, in fact, ingest Meldonium sometime between April 11th, 2016, and April 27th, 2016.

Tr. 168, 185 (emphasis added).

The weight of the evidence does not support Plaintiffs' theory, as the following additional considerations show (in addition to the reasons why judgment as a matter of law is warranted (*see supra* pp. 17-26)).

Defendants offered uncontradicted fact testimony and documentary evidence from Dr. Krasavin and Mr. Povetkin himself that Mr. Povetkin used Meldonium in August and September of 2015 and not thereafter. *See*, *supra* at 24. Plaintiffs offered no fact evidence to rebut this testimony. Instead, and as further detailed below, Plaintiffs' counsel attempted to discredit Mr. Povetkin in violation of the Court's rulings, and to improperly shift the burden of proof to Defendants. *See, e.g.*, Tr. 533-36, 540 (focusing on Mr. Povetkin's errata sheet for the majority of his cross-examination); 772-73 (asking on summation, "where is the proof that Mr. Povetkin even took Meldonium in 2015?"). But a challenge to Mr. Povetkin's credibility and an improper burden-shifting argument on summation are no substitute for the factual evidence that Plaintiffs simply did not offer.

Dr. Goren's expert testimony regarding the pharmacokinetics of Meldonium further tipped the scales in Defendants' favor. Plaintiffs made much of testimony elicited from the four experts—who, with the exception of Dr. Goren, were not qualified as experts in pharmacokinetics—that the Tretzel study only offers "data" up to 49 days after administration of Meldonium and that ingestion of a single dose of Meldonium in 2016 could in theory be consistent with Mr. Povetkin's April 27th positive test. *See, e.g.*, Tr. at 233-35 (Dr. Butch), 451-53 (Dr. Eichner), 616 (Dr. de Boer), 689 (Dr. Goren). But, as Dr. Goren explained to the jury, the "data" in the Tretzel study reflect a *concept*—long-term retention in the body of Meldonium—that is supported by the other pharmacologic studies and information, including the WADA Notices, the Tretzel study itself, and the fact that a single dose of Meldonium would have no effect on the body. Tr. 680-81, 686-88. Dr. Goren concluded that the totality of the evidence supports Defendants account that Mr. Povetkin last ingested Meldonium in September 2015. Dr. Eichner himself admitted that the three-month life-span of the red blood cell is "isn't an outside limit at all" (Tr. 468), and the Tretzel study confirms that the detection window is explained by the "successive and slow release of erythrocyte-entrapped meldonium into the circulation." Defs. Ex. C at 501. Conversely, despite the "no data" mantra, there was *no* evidence that Meldonium would be gone from the body after 49 days. Most important WADA itself instructed all its lab directors *not* to report concentrations such as those in this case as "adverse" because it is unfair to an athlete to conclude that he or she ingested Meldonium after January 1, 2016 given such low concentrations. Defs. Ex. E.

B. Dr. Butch's Opinions About Mass Spectrometry Must Be Disregarded

In weighing the evidence under Rule 59, the Court is free to assess the credibility of competing expert witnesses. *Martin v. Moscowitz,* 272 F. App'x 44, 47-48 (2d Cir. 2008) (affirming the district court's grant of Rule 59 motion). Plaintiffs' entire case concerning the supposedly "negative" tests rested on the shoulders of Dr. Butch, who testified both as a fact and an expert witness on behalf of Plaintiffs. He was paid $1,000 per hour for his testimony—apparently including his fact testimony—and $500 per hour to consult with the Plaintiffs' counsel. Tr. 205-206 (Butch). At trial, Dr. Butch testified that he was there "defending the [UCLA] laboratory." Tr. 206 (Butch).

What did Plaintiffs get from Dr. Butch for $1,000 per hour?

First, they got an expert who was not qualified to testify about ion suppression in the reading of mass spectrometry data. Unlike Dr. de Boer, or even the technicians Dr. Butch supervises in the UCLA laboratory, Dr. Butch has personally conducted relatively little mass spectrometry testing over the course of his career. *Compare* Tr. 204 (Butch) (Dr. Butch stating that he read "hundreds" of files of raw mass spectrometry data) *with* Tr. 412-13 (Butch) (individuals tasked with reading screen data in the UCLA laboratory "could read maybe 150 samples a day"); Tr. 553-54 (de Boer) (Dr. de Boer read approximately 12,000 mass spectrometry data runs over a period of six years).

Most important, Dr. Butch admitted that he had never heard of ion suppression in the gas phase of a mass spectrometry run. Tr. 726-727 (Butch: "I've not heard it called that" and "I'm not familiar really with ion suppression occurring in the collision cell"). Dr. Butch claimed—erroneously—that ion suppression could only take place in the liquid phase. Tr. 718-19 (Butch). The fact that Dr. Butch had never heard of ion suppression in the gas phase proves that Dr. Butch was unqualified to serve as an expert on mass spectrometry, as the phenomenon is described in the scientific literature, which reports that ion suppression occurs in the gas phase as well as the liquid phase. *See, e.g.*, M.W.J. van Hout, *Ion Suppression in the Determination of Clenbuterol in Urine*, Rapid Commc'ns Mass Spectrom, 2003: 17, at 245 ("competition between compounds for the charge in the liquid phase may result in ion suppression as well. A final possible cause [of ion suppression] are ***gasphase*** neutralisation processes.") (emphasis added); Thomas A. Annesley, *Ion Suppression in Mass Spectrometry*, Clinical Chem., 49: 7, at 1041-44 (July 2003) ("One important factor that can affect the quantitative performance of a mass detector is ion suppression. . . . . Ionization effects can theoretically occur in either the solution phase *or the gas phase*.") (emphasis added). This literature bears out Dr. de Boer's testimony that ion suppression in the collision cell—or gas phase—of mass spectrometry occurs, though it is "not a very common process." Tr. 580-81 (de Boer); *see* Tr. 562-63 (describing collision cell, or gas phase).

Testimony from an expert witness on a topic the expert is not qualified to opine on is improper. *See Restivo v. Hessemann*, 846F.3d 547, 578 (2d Cir. 2017) (affirming exclusion of testimony regarding matters about which expert was "not equipped to testify."); *Nimely v. City of*

New York, 414 F.3d 381, 398 (2d Cir. 2005) (remanding for new trial on the grounds that, *inter alia*, expert's testimony regarding police credibility was improper and his qualifications to render such testimony "highly dubious"); *McCullock v. H.B. Fuller Co.*, 981 F.2d 656, 657-58 (2d Cir. 1992) (affirming exclusion of expert testimony where expert was not qualified in the fields relevant to the issue in dispute).

Second, Dr. Butch aggressively slipped hearsay into the record, primarily about documents created by others at the UCLA laboratory. Dr. Butch began by testifying "generally" about "the process for testing at the UCLA lab when a sample arrives." Tr. 206 (Butch). But, through liberal use of the first person plural, Dr. Butch managed to slip in extensive hearsay testimony about Mr. Povetkin's testing specifically. The following exchanges are illustrative:

> A: If *we* see a peak in the two Meldonium windows you're looking at there, and it's a high enough intensity, enough of that peak, big enough, *we* would then make a decision as to whether *we* think that may be Meldonium. If *we* feel that way, then *we* would move forward to confirmation testing to prove that that is Meldonium. * * *
>
> Q: Okay. Then after you do the screen, what do you do?
>
> A: Okay. Then we would go on and do confirmation testing for this particular sample for Meldonium only. * * *
>
> Q: Was there a level of Meldonium found in Mr. Povetkin's urine?
>
> A: *We* reported out a concentration of 70 nanograms per milliliter. * * *
>
> Q: Now, when *you* tested for any of Mr. Povetkin's samples, did you know you were testing for Mr. Povetkin?
>
> A: Of course not. * * *
>
> Q: What's that document?
>
> A: This is the raw data for the confirmation testing on that sample.
>
> Q: And what does it show?
>
> A: So in the screen *we* had looked for only two Meldonium windows. In the confirmation *we* look for three. That allows

us to have a higher degree of certainty that the sample contains Meldonium. * * *

Q: Now, you said a minute ago that *you* had also done confirmation testing on the April 7 and 8th and 11th samples?

A: That's correct. All of those went to confirmation.

Q: And why?

A: Well, because *we* saw peaks in both of the windows. Although two of the three samples, I believe it was the April 8th and April 11 sample, didn't pass the criteria to go on the confirmation testing, but the fact *we* saw peaks in those windows, and they were pretty big peaks, told *us we* needed to take it to confirmation testing because *we* do not want to miss a sample that has a prohibited substance in it. * * *

Q: And what does the sample show? The third page is the confirmation of the sample?

A: This is the confirmation testing *we* looked at for the positive sample, yes.

Tr. 214, 215, 218-19, 224, 238, 240 (Butch) (emphasis added).[7] Dr. Butch revealed only on cross-examination that he was not personally involved in the testing of Mr. Povetkin's early-April samples:

Q: All right. So like all that testimony you gave out on direct, where you said, you know, we looked at this or we looked at that, you're relying on the work of other people in your lab, right?

A: Yes. * * *

Q: Who made that decision [to advance the April 8 sample to confirmation testing] in the UCLA lab?

A: The person who read the screen data.

Q: What's that person's name?

A: I don't know the name of the person that read the screen data. We have multiple people that read the screen data. We do so

[7] Plaintiffs' counsel often led Dr. Butch to offer such hearsay. *E.g.*, Tr. 257-58 ("Q: Okay. Nonetheless, when *you* did the confirmation on that sample, it turned out to be negative, right? A: That's correct, yes.") (emphasis added)

> much screening and so many samples that I have five people who read data and that's all they do all day.

Tr. 345-46, 412 (Butch).

By blurring the line between his disparate roles, Dr. Butch gave the illusion that he was more credible in each role than he actually was. For instance, he attempted to portray his expert opinion that Meldonium was not present in the first three April samples as fact by linking his statement of opinion to his laboratory's purported adherence to WADA technical standards: "It's not my opinion. It's based on the WADA documents that we must follow." Tr. 411 (Butch); *see also* Tr. 410 (Butch), 413-14 (Butch).

The Second Circuit has warned specifically against the prejudicial potential of dual expert and fact testimony, which "confers upon [the witness] '[t]he aura of special reliability and trustworthiness surrounding expert testimony, which ought to caution its use.'" *United States. v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2002). When a witness offers both fact testimony and an expert opinion, "a juror understandably will find it difficult to navigate the tangled thicket of expert and factual testimony from the single witness, thus impairing the juror's ability to evaluate credibility." *Id.* at 54. The Court must be vigilant in limiting expert testimony to prevent "the illegitimate and impermissible substitution of expert opinion for factual evidence." *United States v. Mejia*, 545 F.3d 179, 190 (2d Cir. 2008).

In *Dukagjini*, a drug prosecution, the DEA case agent testified as an expert regarding the meaning of code words used by the defendants in recorded conversations. *Id.* at 50. But, much of the agent's testimony "appear[ed] to have been based primarily upon his familiarity with the specifics of the case, rather than his general expertise in the drug trade." *Id.* at 51. The Second Circuit found that the district court had failed to properly monitor the agent's expert testimony, allowing him to smuggle in fact testimony under the guise of his expert opinion and thereby prejudice the defendants. *Id.* at 55. And in *Mejia*, the Circuit vacated a racketeering conviction because the Government used expert testimony in lieu of direct evidence to prove predicate acts of murder. The court explained that "acceptable use of expert testimony for [a] limited purpose," such as connecting the defendant to otherwise proven murders, "does not make it acceptable to substitute expert testimony for factual evidence of the murders in the first instance." 545 F.3d at 195. In addition, the court explained that an expert may not "simply transmit that hearsay to the jury." *Id.* at 197. It was error to allow the hearsay where "at least some of his testimony involved [the expert] merely repeating information he had read or heard." *Id.* Where "experts" act in this way—blending fact and expert testimony, transmit hearsay, and purport to be experts on the very facts at issue in the case, "the experts are no longer aiding the jury in its factfinding; they are instructing the jury on the existence of the facts needed to satisfy the elements of the charged offense." *Id.* at 191. That happened here. In *Mejia,* the court found it "a little too convenient that the Government has found an individual who is expert on precisely those facts that the Government must prove." *Id.* Here, of all the experts in the world, Plaintiffs found the one who supervised the lab that did the testing, paid him $1,000 per hour, and had him transmit hearsay (or speculation) about what happened inside the UCLA lab after he flouted his discovery obligations. Other people—not Dr. Butch—tested Mr. Povetkin's samples, identified Meldonium in the screening tests, tested them again, found that they matched five of six identification criteria for Meldonium, and decided not to include *any* report on Meldonium, positive or negative. Yet it was Dr. Butch who claimed that these tests were "negative." Dr. Butch's ultimate conclusion that the compound was not Meldonium depended on pure speculation that some other compound was showing peaks at 58.07 and 59.07 as well.

Third, Dr. Butch's ultimate conclusion on rebuttal that the compound was not Meldonium depended on pure speculation that some other compound was showing peaks at 58.07 and 59.07 as well: "I'm suspecting there's co-elution in those windows [58.07 and 59.07] as well." Tr. 728 (Butch); *id.* (admitting "You didn't actually check the raw data at 58 or 59."). It is highly implausible that there is a mystery molecule weighing 0.0092 more than Meldonium that also has an identical fingerprint and is otherwise a match for Meldonium. A verdict may not rest on such speculation. *See Hernandez v. Keane*, 341 F.3d 137, 143 (2d Cir. 2003) ("The jury's role as the finder of fact does not entitle it to return a verdict based only on confusion, speculation, or prejudice") (internal quotation marks omitted); *Bekiaris v. U.S.*, 96-civ-302, 1998 WL 418917 (S.D.N.Y. Jul. 23, 1998) (entering judgment for defendant in personal injury case where plaintiffs' primary evidence on the element of causation was speculative testimony of a non-credible expert witness).

* * *

At bottom, Dr. Butch's testimony on the core issue in this case was a mélange of un founded assumptions, opinions beyond his expert competency, smuggled-in hearsay, and admitted speculation. This improper testimony led the jury to conclude that the early-April tests were "negative" for Meldonium and positive for some mystery substance that matched Meldonium in five of the six identification criteria.

C. The Court Should (1) Grant a New Trial in Light of Plaintiffs' Abuse of the Unfairly Expedited Trial Process and (2) Reopen Discovery and Conduct an Evidentiary Hearing to Get to the Bottom of What Actually Happened in the UCLA Laboratory

One of the grounds for the grant of a new trial pursuant to Rule 59 is that "the trial court was not fair." *Newton v. City of New York*, 171 F. Supp. 3d 156, 164 (S.D.N.Y. 2016). Here, Plaintiffs' abuse of the rush to trial severely prejudiced Defendants. Because Dr. Butch and

Plaintiffs failed to comply with their discovery obligations, Defendants received the most important documents in the case—including UCLA's test reports for the April 7th, 8th, and 11th samples and the raw data underlying the reports—mere weeks or days before trial. *See supra* at 14-16.

Thus, the omission from the UCLA reports of the results of the 1002 test method used to detect Meldonium—as well as the detectable presence of Meldonium in the corresponding raw data—were only revealed on the eve of trial. Defendants did not have the opportunity to use discovery tools to answer the unanswered questions raised by these revelations. Defendants and the Court have no information from the employees of UCLA who were actually involved in the testing. Consequently, the conduct of the UCLA laboratory remains a black box, and the dearth of information concerning the facts and circumstances of the testing of Mr. Povetkin's samples has left a vacuum that Plaintiffs improperly filled with hearsay and speculation at a price of $1000 per hour by Dr. Butch.

The late-produced UCLA test result reports and underlying documentation for the testing on the early April samples raise serious questions about what happened inside the UCLA laboratory. There has been no explanation whatsoever of why the UCLA laboratory omitted the 1002 test method, which detects Meldonium, from its reports to VADA on Mr. Povetkin's first three April samples. *See* Defs. Exs. K, L. Dr. Butch, who certainly had time to make this inquiry at the UCLA laboratory, did not explain the omission during either his initial or his rebuttal testimony at trial. Plaintiffs' counsel, during his closing statement at trial, claimed that the omission of 1002 was a "typo" (Tr. 758), but Plaintiffs submitted no evidence to support that explanation and it appears implausible given the degree of effort that went into the UCLA testing for Meldonium.

Likewise, the close match between the UCLA "confirmation" documents and the known "fingerprint" of Meldonium—a perfect match on five of six identification criteria—raises serious questions about the facts and circumstances surrounding the UCLA testing and reporting of those samples. But because documents were produced in such close proximity to trial—and the raw data has *never* been produced—Defendants have been unable to learn the answers to those questions. Such answers would require a *complete* document production—which UCLA has never made—and testimony under oath of percipient witnesses from UCLA—who have never provided such testimony.

The truth-seeking function also requires disclosure of what Dr. Butch and Plaintiffs' counsel knew and when they knew it. But the record is devoid of any information from any communications within UCLA, any communications between Dr. Butch and counsel for Plaintiffs, and any testimony from any of the UCLA employees who read the mass spectrometry screen testing of Mr. Povetkin's samples, made the decisions to advance his samples to confirmation testing, read the confirmation testing, and ultimately decided to omit any mention of Meldonium from the UCLA drug testing reports.

Because Dr. Butch's story changed so rapidly just before and even during trial, Defendants never had a fair opportunity to confront him with the literature and documents. Until he testified on rebuttal, he had not disclosed his opinions on ion suppression at all. This prejudicial non-disclosure was a direct result of (a) Dr. Butch's failure to comply with his subpoena and court-ordered discovery obligations; (b) Dr. Butch's continuous stream of new expert reports; and (c) the absurd proximity of the close of discovery to the start of trial—with Dr. Butch's final expert report coming the Friday afternoon before the start of trial Monday morning.

The only way now to assess the damage is to reopen discovery from UCLA and conduct an evidentiary hearing. To allow this jury verdict to stand without learning the true facts—suppressed by Dr. Butch during discovery—would be a horrible miscarriage of justice.

D. Misconduct on Summation by Plaintiffs' Counsel Unfairly Influenced The Jury And Prejudiced Defendants

A new trial should be granted "when the conduct of counsel in argument causes prejudice to the opposing party and unfairly influences a jury's verdict." *Pappas v. Middle Earth Condo. Ass'n*, 963 F.2d 534, 540 (2d Cir. 1992) (counsel improperly invoked regional bias on summation). In considering a Rule 59 application based on attorney misconduct, the Court should "consider the 'totality of the circumstances' including 'the nature of the comments, their frequency, their possible relevance to the real issue before the jury, the manner in which the court and the parties treated the comments.'" *Hopson v. Riverbay Corp.*, 190 F.R.D. 114, 122 (S.D.N.Y. 1999) (attorney misconduct warranted new trial). Where counsel engages in multiple instances of misconduct, the "number and gravity of counsel's improprieties" can place prejudice to the opposing party beyond the reach of the Court's curative instructions. *Koufakis v. Carvel*, 425 F.2d 892, 904 (2d Cir. 1970). Such is the case here. Plaintiffs' counsel littered his summation with improper remarks, the cumulative effect of which was to prejudice Defendants so greatly in the eyes of the jury that curative instructions or admonitions of counsel could not have served to eliminate the prejudice. Plaintiffs' counsel was called back to the robing room twice and admonished outside the presence of the jury. After the second admonishment, he turned to opposing counsel and said, in words or substance, "I knew I wouldn't get away with that one but it was worth a try." Yalowitz Dec. ¶ 13.

1. Counsel Misrepresented the Record and Stated Facts Not in Evidence

In summation, plaintiffs' counsel repeatedly misstated the record. *See Hopson*, 190

F.R.D. at 122 (identifying misstatements of facts and law as part of the several instances of misconduct that, in the aggregate, warranted a new trial).

Critically, Plaintiffs' counsel blatantly misstated the facts about the UCLA drug testing reports, claiming that "[e]veryone knows it was reported negative" and the omission of the Meldonium test results from the UCLA reports for the April 7th, 8th, and 11th tests was "a typo." Tr. 758. There is no evidence in the record to support that explanation, and the conduct of Dr. Butch during discovery raises serious questions about whether Plaintiffs' counsel was intentionally lying or merely reckless with the truth on this critical point.

In addition, Plaintiffs' counsel falsely accused Mr. Povetkin of trying to "change his deposition." Tr. 776. The Court sua sponte corrected Plaintiffs' counsel and he *still continued to* misrepresent the evidence:

> Mr. Povetkin signed a document in which he said that the word "doctor" had been mistranslated and he had actually said "trainer."
>
> THE COURT: Okay, and, again, members of the jury, if your recollection of the evidence is different than counsel's recollection of the evidence, it's your recollection that controls.
>
> MR. BURSTEIN: Absolutely. But read the testimony, ask for the testimony. Why would he do that? Because he knew ***after he heard Dr. Krasavin's testimony, he learned that Dr. Krasavin wasn't going to support him, he had to change his story***. (Tr. 776.)

Counsel was improperly referring to evidence outside the record. The "errata" was not offered in evidence, and the testimony did not support the accusation. Tr. 535-40 (Povetkin).

2. Counsel Improperly Stated his Personal Opinion of Mr. Povetkin's Honesty

After his improper account of Mr. Povetkin's supposed attempt to alter his deposition testimony, counsel compounded the prejudice by improperly expressing his opinion of Mr. Povetkin's truthfulness:

> I don't blame him. This is an important case to him. I blame him for not, respectfully, not being honest, but I don't do it, there's nothing else, those are the facts of life. (Tr. 777)

Counsel's personal opinion that Mr. Povetkin was "not being honest" was highly improper. A lawyer may not express his or her personal opinion as to the truth or falsity of any testimony or evidence. *See Bellows v. Dainack*, 555 F.2d 1105, 1108 (2d Cir. 1977) (Where Plaintiff's counsel expressed personal opinions at summation about the credibility of defendants, the court found "the summation . . . sought to arouse undue passion and prejudice on the part of the jury and clearly exceeded the bounds of propriety"); *Smith v. Piedmont Airlines, Inc.*, 728 F. Supp. 914, 919 (S.D.N.Y. 1989) (finding it improper "that counsel for plaintiff impermissibly vouched for the credibility of plaintiff's physician when he expressed to the jury his personal opinion about her character"); ABA Rule of Prof'l Conduct 3.4(e) (A lawyer shall not "state a personal opinion as to the . . . the credibility of a witness").

3. Counsel Flouted the Court's Rulings by Linking Honesty and Motive

Counsel's attacks on Mr. Povetkin (via the errata sheet and the accusation of dishonesty) were in direct violation of the Court's earlier rulings on this topic that "motive to falsify" would not be allowed:

> MR. BURSTEIN: * * * His motive to falsify is so overwhelming and to come up with a story, I should be allowed to impeach him on the theory that he knows the consequences of what will happen if he loses here.
>
> THE COURT: I'm inclined to say no to that. It seems that it might be appropriate for you to—again, I don't want to get into all of this in terms of his credibility and bias and motive to testify.
>
> * * *
>
> MR. BURSTEIN: It's his motive to testify falsely. Right now, I mean, it's true that we're in a vacuum, but if a witness has a desire to—
>
> THE COURT: But I believe that you were the person who was objecting to any notion that the defendants wanted to put out

> anything like he wouldn't risk his career by micro-dosing at this small level because that small level that would be showing up there wouldn't give him any benefit, and he wouldn't risk his career by micro-dosing at this level. Wouldn't that be fair comment to start re-going down this road? And that's something that you very strenuously didn't want to get into.
>
> MR. BURSTEIN: You know what, I have to give it to you, Judge. I'll give you that one. So I have to back off, * * * (Tr. 515, 517).

By disregarding the Court's order and urging a jury to disbelieve Mr. Povetkin, Plaintiffs' counsel demonstrated an "audacious disregard" for the Court's rulings that was "'so serious and flagrant [as to go] to the very integrity of the trial.'" *See Ramos v. Cnty of Suffolk*, 707 F. Supp. 2d 421, 429 (E.D.N.Y. 2010) (granting a new trial based on defense counsel's statements that referenced plaintiff's drug use in violation of the court's ruling and suggested, without any support in the record, that plaintiff had previously filed a false report with the police).

This attack on Mr. Povetkin's motives was central to the summation, and was a blatantly unfair ambush in direct violation of the Court's prior orders. Defendants *obeyed* the Court's order, to their severe detriment. There was no testimony from Defendants that Mr. Povetkin and his team were not so foolish as to jeopardize a world championship match by "microdosing" with an over-the-counter medication that is not performance-enhancing and that is not effective in a microdose. Plaintiffs flouted that order and left the jury thinking that Mr. Povetkin was trying to gain an edge with a performance-enhancing drug.

4. Plaintiffs' Counsel Improperly Attacked Defense Counsel

Plaintiffs' counsel asked the jury to draw negative inferences about Defense counsel's conduct of discovery—based on improper hearsay testimony of Dr. Butch:

> Mr. Yalowitz wants to talk about Dr. Butch not having seen the second samples, but why? Because they did not want full access to the second sample, to the three negative tests. They were not prepared to allow my client and me to actually see what the truth

> is, to get access to it. You can draw a very strong inference from that.

Tr. 760; 789 (“Why did they initially refuse to give Dr. Butch the information he needed?”).

The entire basis for this assertion was an obviously improper hearsay statement from Dr. Butch, which counsel read and showed to the jury: “And were you told why they weren't available?” “It was indicated to me that the other side was unwilling to allow it.” Tr. 759.

At sidebar, counsel even lied to the Court, falsely claiming that this testimony had come in without objection. *Compare* Tr. 790 (“you didn’t object to it”) *with* Tr. 424 (objections overruled). In fact, the board he put up in front of the jury had the objections blacked out.

Similarly, plaintiffs’ counsel falsely asserted that Dr. de Boer “didn’t give you all of his testimony because he admitted he had testified at other proceedings but somehow didn't tell us about that and why is that?” Tr. 767. In fact, Dr. de Boer’s report correctly included “a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition.” Fed. R. Civ. P. 26(b)(2)(B)(v); *see* Tr. 667-68. Yet Plaintiffs’ counsel persisted on this issue even after learning the true facts at sidebar, and even cut the witness off when he was trying to explain his answer to the improper questions *on re-cross.* Tr. 670.

Using summation to suggest that Defendants were hiding the truth during discovery was “unfair to the last degree.” *Brown v. Walter*, 62 F.2d 798, 799 (2d Cir. 1933) (L. Hand, J.) (new trial required where plaintiff suggested that the “defence had been fabricated by the insurer” without “the slightest support in the evidence”).

Plaintiff’s summation was also infected by improper personal impugning of defense counsel. Indeed, Mr. Burstein opened his remarks by asserting that “Mr. Yalowitz” had made “selective misrepresentations” of the record. Tr. 758-59. Counsel went on:

> So you have Mr. Yalowitz, and he's a fine lawyer and he's working hard for his client, but when you don't have the facts, unfortunately, sometimes what you have is not the most accurate recounting of what the evidence is. (Tr. 762.)

In fact, counsel referred to "Mr. Yalowitz" by name a dozen times in his summation, and even was admonished by the Court (at sidebar) to cease "these attacks on counsel." Tr. 792. Denigrating defense counsel is improper and can prejudice the client by tainting the jury's consideration of the evidence offered by the client. *Koufakis*, 425 F.2d at 904 ("Mr. Berg's summation was replete with improper personal references to himself, and to Mr. Weisman, trial counsel for the appellants. It is enough to say in general that counsel's remarks were in reckless and purposeful disregard of all the proprieties; they went far beyond the permissible limits of fair comment on what was before the jury and dealt altogether too much with matters and considerations outside the record which were obviously intended to prejudice the appellants in the eyes of the jury and seek their favor for the plaintiff.").

5. Counsel Repeatedly Misstated the Burden of Proof

Counsel repeatedly misstated the law by attempting to shift the burden of proof to defendants throughout his summation. For instance, he asked the jury to consider: "[W]here is the proof that Mr. Povetkin even took Meldonium in 2015?" Tr. 772-73. This was not an isolated slip-up:

> But [Povetkin's] never proven that he explicitly knows he didn't take Meldonium, because the dots have never been connected. (Tr. 788.)
>
> [Defendants] have no witness or any data to support the notion that he last took it in 2015. (Tr. 797.)
>
> Because, again, [Povetkin] might have taken it in 2015 and in 2016, but if he can't prove—not prove, because he doesn't have a burden. If there's no evidence that he took it in—that allows you to conclude that he took it in 2015, you have to grant a verdict in our favor, because there was Meldonium in his system and his

> explanation is 2015. If you reject it, you have to find for the plaintiff. (Tr. 786.)
>
> [de Boer] testified he could not pinpoint when Mr. Povetkin took Meldonium. (Tr. 767.)

These were blatantly incorrect statements of the burden of proof in this case. The Court even admonished counsel (at sidebar): "They don't have a burden in this case." Tr. 792. Yet Plaintiffs' summation left the jury with the misimpression that Defendants needed to prove exactly when Mr. Povetkin took Meldonium in order to prevail. Such gross misstatements of the law are grounds for a new trial. *See, e.g., Hopson*, 190 F.R.D. at ¶2 (Counsel's misstatement of alcohol impairment law one of several instances of misconduct justifying a new trial).

6. Counsel Improperly Referred to Mr. Povetkin's Trainer as a Missing Witness After Blocking His Testimony

Counsel accused Defendants of failing to present Mr. Povetkin's trainer as a witness, when in fact Defendants attempted to present his testimony, and Plaintiffs blocked it.

During summation, counsel began to assert his "missing witness" theory: "The people who supposedly had provided the vitamins or whatever it was—". Tr. 777. Following objection, counsel admitted at sidebar that he was about to ask the jury "Where's the trainer and where's the manager." Tr. 778. The Court forbade it. Tr. 778-82. Then, in defiance of the Court's order, counsel put a board only a few feet from the jury with the question typed out in capital letters: "WHERE IS MR. POVETKIN'S TRAINER?" *See* Tr. 788 ("But here's other questions you should ask yourselves").

This drew another objection, and Plaintiffs' counsel left the board sitting on its easel when he walked back into the robing room. It was displayed to the jury and would have remained displayed to the jury during the sidebar had Defendants' counsel not taken it down. *See* Tr. 789, 799.

Earlier, Plaintiffs had successfully opposed Defendants' application to allow submission of deposition testimony or video testimony during trial of Mr. Povetkin's trainer. *See* K. Yalowitz Letter to Hon. A. Carter (Feb. 5, 2017) (DE-208); Tr. 88-100 (explaining importance of issue); Tr. 156-57 (purpose of calling trainer as a witness would be "to rebut plaintiffs' claim that this whole theory about who gave Povetkin the Meldonium is a lie"); Tr. 809 (denial of Defendants' request to call trainer).

While the court gave a curative instruction, the harm, combined with the prejudice caused by counsel's other misconduct, was too great to overcome merely with an instruction. *Koufakis*, 425 F.2d at 904.

* * *

Counsel's misconduct on summation was stunning, was in blatant disregard of the Court's orders, and was pre-planned. Counsel even "knew" he wouldn't get away with it. To allow this verdict to stand would be to reward misconduct.

CONCLUSION

For the reasons stated above, Defendants respectfully request that the Court enter judgment as a matter of law in favor of Defendants on the issue tried thus far in this case. In the alternative, Defendants request that the Court grant a new trial, to be preceded by discovery and an evidentiary hearing regarding the facts and circumstances of UCLA's testing of Mr. Povetkin's April 7, 8 and 11 samples.

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